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In The

Supreme Court of the United States

October Term, 1977

No. 77-1392

STATE OF NEVADA, ex rel., ROLAND D. WESTERGARD, State Engineer, and BELL BRAND RANCHES, INC., a Nevada corporation, and J. J. WHEELER, an individual, and WHEELER MACHINERY CO., a corporation, a co-partnership, dba W. D. RANCHING COMPANY,

Petitioners,

vs.

SALMON RIVER CANAL COMPANY, Ltd., a corporation,

Respondent.

BRIEF OF RESPONDENT SALMON RIVER CANAL COMPANY, LTD. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SALMON RIVER CANAL COMPANY, Ltd., a corporation,

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STATEMENT OF THE CASE

Petitioners' Statement of the Case omits reference to many significant factual matters. Respondent accordingly submits the following additional information concerning the case:

I.

The Judicial Decree of 1953

Central to Respondent's claim is a judicial decree entered by U. S. District Court and dated July 6, 1953, relating to the use of the waters of the Salmon Falls Creek and its tributaries (Tr. pp. 2-3). The decree, though unique in its way of governing the allocation of the waters of Salmon Falls Creek and its tributaries,

expressly limited the application of irrigation water by water users, other than the Respondent, to specifically described acreage (Tr. pp. 90-146).

The decree by its terms bound the parties subject thereto and further provided that the judgment would be binding on the "heirs, executors, administrators, and assigns" of the defendant parties (Tr. p. 113). Petitioners, Bell Brand Ranches, Inc., and J. K. Wheeler and Wheeler Machinery Company (hereinafter Co-Petitioners) are the assignees or successors in interest of certain of those party defendants subject to the decree and thereby are subject to the decree themselves (Tr. p. 1171 Bell Brand Ranches, Inc.); (Tr. p. 119 Petitioner J. K. Wheeler and Wheeler Machinery Company).

The specific language of the decree regarding the application of the waters of the Salmon River and its tributaries is as follows:

> "Said owners shall not appropriate any of the waters of the Salmon River or its tributaries for any land other than those hereinabove specifically described, and shall confine the use of the waters of such streams to the lands described . . . and shall accept the waters herein provided for use on the said specific acreage and no other, as provided in this judgment in full satisfaction of any and all rights in and to the waters of the Salmon River and its tributaries. . . ." (Tr. p. 109 Bell Brand Ranches, Inc.); (Tr. p. 102 J. K. Wheeler and Wheeler Machinery Co.).

It is uncontroverted that the co-petitioners do not deny that they were applying water to lands outside of the decree's specifically described lands. It would appear that it would be Co-Petitioner's contention that the waters so applied are not tributary to the Salmon River and its

tributaries. This contention is purported supported by the Petitioners pointing to the issuance of water permits to Co-Petitioners which they claimed are inferentially conclusive evidence of an administrative determination that the underground waters covered by said permits are not tributary to the Salmon River or its tributaries.

It is the contention of the Respondent, however, that the underground water so applied by Co-Petitioners to lands other than those specifically described in the 1953 decree are tributary to the Salmon River and its tributaries and that the permits issued to the Co-Petitioners are in contravention of said decree and are void in as much as the permits attempt to abrogate the pre-existing water rights of the Respondents as determined under the 1953 decree.

Respondent additionally respectfully urges that the District Court by the terms of the before-mentioned decree retained jurisdiction, "over matter of interpretation of this decree and matters relating to the administration and enforcement thereof." (Tr. p. 113). Respondent would contend that by the express terms of the 1953 adjudication the District Court, not the Nevada State Engineer, had jurisdiction over the present case to adjudicate the relative water rights of the parties.

II.

The Water Permits

All the water permits now in question, which were either issued to Co-Petitioners or their predecessors in interest, contained an express reservation which reads as follows:

"This permit is issued subject to all existing rights on the source." (Tr. pp. 935-936, 939-940, 1130).

It is the Respondent's position that these reservations in Co-Petitioners' permits recognize that Co-Petitioners' permits were issued subject to the existing water rights of Respondent and, accordingly, subject to adjudication under the terms of the decree of July 6, 1953.

III.

Reasons for Denying the Writ

A. Failure to satisfy the considerations of Rule 19(1)(b).

The Respondent respectfully contends that the Ninth Circuit Court of Appeals in their decision, dated November 21, 1977 (Petitioners' Appendix "A", p. 2), did not render a decision "in conflict with the decision of another Court of Appeals on the same matter," and further that the decision of the aforesaid Court did not "conflict with applicable state . . . law." (Rules of the Supreme Court of the United States, Rule 19 (1) (b)). This contention will be fully argued by the Respondent in the following subheadings under this topic.

1. The absence of any conflict with the decisions of this Court or of another Court of Appeals on the same matter.

Petitioners claim that the water permits issued by the Nevada State Engineer to Co-Petitioners are final and conclusive and bar any judicial review of the State Engineer's determination to grant the said permits and a claimed inferential decision of separate water source in making the said determination because Respondent did not protest the issuance of the permits at the administrative level. The Ninth Circuit Court of Appeals in their opinion concluded that the water permits were not final and conclusive as to the water rights of the parties because of the fact that the permits were administrative tools (Petitioners' Appendix "A", pp. 5-6), issued by an agency of the State which had neither primary nor exclusive jurisdiction (Petitioners' Appendix "A", p. 12), to adjudicate water rights in the State of Nevada, and for the further reason that the Respondent held pre-existing water rights, under a previous judicial decree rendered in 1953, reserving jurisdiction over the interpretation, administration and enforcement of said decree, which Respondent maintains is in conflict with the issued permits that are the center of this dispute. The opinion also, after an analysis of the relevant statutes, found that there are only two avenues of determining water rights with finality and with conclusiveness under the statutory scheme of Nevada: administratively (per NRS §§ 533.090 et seq.); and through the institution of a suit in a State District Court pursuant to NRS § 533.240 (Petitioners' Appendix "A", p. 13). These finalizing avenues were not pursued by the Co-Petitioners in this case.

a. Cases relied upon by the Petitioners to evidence conflict between the present opinion of the Court of Appeals and the decisions of this Court and other Courts of Appeals.

A case heavily relied upon by the Petitioners to evidence a conflict between the decision of the Ninth Circuit Court of Appeals and this Court and sister Courts of Appeals is *United States v. Utah Construction & Mining Company,* 384 U. S. 394 (1966). This citation as author-

ity, however, is inapposite to the instant facts. In *United States v. Utah Construction & Mining Company,* supra, this Court found that the doctrine of res judicata applies to administrative determinations where the administrative agency is (1) acting in a judicial capacity; (2) resolving disputed issues of fact properly before it and, finally, (3) where the parties to the dispute have had an adequate opportunity to litigate.

In the case presently before the Court for consideration, the Ninth Circuit Court of Appeals found that the state agency involved in the determination was not acting in a judicial or quasi judicial capacity. Indeed, the opinion of the Appeals Court found that the agency's approval of appropriative permits is largely ministerial (Petitioners' Appendix "A", p. 6). The Appeals Court conclusion rested in the main on the statutory language of NRS § 533.370 (1) indicating the small amount of discretion delegated to the State Engineer and NRS § 533.430 (1) showing that the appropriative permits are subject to further review and determinative action (Petitioners' Appendix "A", pp. 7-8). Coupled to this, is the Appeals Court conclusion that the only two avenues of finalizing and/or adjudicating water rights were not pursued by the Co-Petitioners in regard to the water rights claimed under the issued permit. Since these avenues were not pursued there can be no claim by the Petitioners that the issuance of the water permits finally and conclusively decided the disputed issue as to whether the appropriated underground waters, as evidenced by said permits, were tributary to the Salmon River and its tributaries. These findings would successfully preclude two of the requisites of the *United States v. Utah Construc-*

tion & Mining Company decision; (1) the necessity of the administrative agency acting in a judicial capacity, and (2) that of having an adequate opportunity to litigate, the later preclusion for the reason that the Co-Petitioners never pursued the administrative route of final water rights resolution per the provisions of NRS §§ 533.090 to 533.525, inclusive.

It is crucial to remember also that the *United States v. Utah Construction & Mining Company* decision involved the interpretation of a government contract where the appropriate law, the Wunderlich Act (28 USC, § 1346), specifically provided that the determination of the administrative agency would be binding. In this case there is no such statutory provision providing that the permit issued by the Nevada State Engineer is conclusive as to water rights, absent the compliance with the provision of NRS §§ 533.090 to 533.525, inclusive, or the resolution of water rights by a State District Court, pursuant to NRS § 533.240.

Another pertinent fact to be interjected at this point in regard to the conclusiveness of the water permits issued by the Nevada State Engineer is the fact that even though the Respondent did not protest the issuance of the permits there was no need to do so as the Appeals Court emphasized:

> "We also note that there is no statute, called to our attention or found in independent research, that requires a protest at the peril of losing pre-existing rights by failing to protest. Nor has any case been brought to our attention, either in Nevada or from any of the arid western states, which holds that a failure to protest a permit application will render the

determinations made in the application final and conclusive to the extent that they may impair or obliterate pre-existing rights." (Petitioners' Appendix, "A", p. 10).

Under the 1953 Decree the Federal District Court reserved to itself the "jurisdiction over matters of interpretation of this decree and matters relating to the administration and enforcement thereof," (Petitioners' Appendix "A", p. 3). This being the situation, the issue of whether or not the underground waters are tributary to the Salmon River and its tributaries could not properly be presented to the State Engineer for determination. Thus, the remaining requirement of the *United States v. Utah Construction & Mining Company* decision, that of the issues of fact being properly before the agency, was not met in the issuance of the water permits because the Respondent was not mandated by statute to protest the permit issuance, and by the fact that pursuant to the express terms of the 1953 Judicial Decree, the Courts, not the State Engineer had to determine whether the decree applied to the underground waters in question.

The other cases cited by Petitioners for showing an apparent conflict between the instant decision and the decisions by this Court and other Courts of Appeals fare no better than the *Utah Construction* case for precedential value when examined. All of the decisions of this Court and the Courts of Appeals cited by Petitioners for the propositions of res judicata, collateral estoppel, primary jurisdiction and the doctrine of exhaustion of administrative remedies involve administrative agencies which either: (1) have specific statutory authority giving conclusive effect to their determinations (*Myers v. Bethlehem*

Shipbuilding Corporation, 303 U. S. 41 (1938); *Seafrain Lines v. Pennsylvania R. R. Company,* 207 F. 2d 255 (3rd Cir. 1953); *United States v. Willard Tablet Company,* 141 F. 2d 141 (7th Cir. 1944); *Woo Foo Wong v. Wixon,* 117 F. 2d 926 (9th Cir. 1941)); (2) have complied with the standards for an adjudicative procedure (*Paramount Transport System v. Chauffers Local,* 436 F. 2d 1064 (9th Cir. 1971); *Marnell v. United Parcel Service of America,* 260 F. 2d 391 (N. D. Cal. 1966)); (3) have exclusive jurisdiction over the subject matter (*Far East Conference v. United States,* 342 U. S. 570 (1952); *SEC v. Central-Illinois Securities Corporation,* 338 U. S. 96 (1949); *Myers v. Bethlehem Shipbuilding Corporation,* supra); or (4) have elements of one, two, or all of the foregoing factors in order to produce the decisional result (*McKart v. United States,* 395 U. S. 185 (1969); *Dennison v. Payne,* 293 F. 333 (2nd Cir. 1923)). The Petitioners' allusion to *Jahn v. 6th Judicial District Court,* 58 Nev. 204, 73 P. 2d 499 (1937), as supported by *United States v. George S. Bush & Company,* 310 U. S. 371 (1940), and *Kaoru Yamataya v. Fischer,* 189 U. S. 86 (1903), is inappropriate too for the reason that *Jahn,* supra, is a case where the water rights had been fully adjudicated, both administratively and judicially, which is not true in the present case, thus rendering the cites of *Kaoru Yamataya,* supra, and *George S. Bush & Company* inapposite.

In this case the application procedure employed by the Co-Petitioners is not given conclusive effect by either statute or by case law. The application procedure employed by Co-Petitioners in this case is not adjudicatory in nature, as will be discussed infra under subheading *B (1),* and therefore the doctrines of res judicata and

collateral estoppel would not apply. In addition, as will also be discussed infra under subheading *B*, the Nevada State Engineer does not have exclusive jurisdiction over the adjudication of water rights under Nevada law, thereby excluding any argument for the Engineer's primary jurisdiction. This last point of no primary jurisdiction residing in the State Engineer is strongly reinforced by the expressed reservation in the 1953 decree previously referred to which expressly reserved in the rendering court the continuing jurisdiction over matters of interpretation, administration and enforcement of the water rights of the Salmon River and its tributaries.

Based therefore on the foregoing, as demonstrated by an examination of Petitioners' authority, it is respectfully urged that there is an absence of any conflict between the instant decision of the Ninth Circuit Court of Appeals and any decision of this Court or of a sister Court of Appeals.

2. The absence of any conflict between the Court of Appeals decision and applicable state law.

The opinion of the Appeals Court does not conflict with the applicable state law. This is true of both the applicable statutory scheme and the case law of Nevada as evidenced by the Court decision of that state.

(a) The statutory scheme.

As previously mentioned in this reply, there is no statute specifically bestowing conclusiveness to a water permit issued by the Nevada State Engineer, absent the compliance with NRS provisions §§ 533.090 to 533.525, inclusive, for an administratively conclusive determination

or a judicial resolution by a State District Court pursuant to NRS § 533.240 (Petitioners' Appendix "A", p. 13). In the case presently before this Court for consideration, the Petitioners did not comply with the above cited provisions for an administrative determination. Neither did they institute a suit in a State District Court to determine whether they could appropriate the water which is the subject of the issued permits. This indicates that the permits issued to the Co-Petitioners are not final determinations and are subject to further review, as concluded by the Ninth Circuit's opinion.

Another indication that there is no conflict between the Ninth Circuit's opinion and the applicable Nevada Statutory provisions is the fact, as pointed out by the opinion, that the provisions governing the application for water permits are found under a different subchapter heading from those dealing with the adjudication of domestic water rights. (See NRS §§ 533.325 et seq. (application provisions) and §§ 533.090 to 533.320, inclusive (adjudication procedures)). It is not an overwhelming fact, but one that evidences the distinction between the two procedures.

(1) The application procedure.

As to the application procedures, it is apparent that the Nevada State Engineer is grossly limited in the discretion that he may utilize in approving applications for water permits. For example, NRS § 533.370.1 directs:

> "Except as provided in subsection 2, (not relevant to our discussions) the State Engineer *shall* approve *all* applications made in proper form where all fees, as provided in this chapter, have been paid which con-

> template the application of water to beneficial use, and where the proposed use or change does not *tend* to impair the value of existing rights, or to be otherwise detrimental to the public welfare." (Emphasis added).

The only determination that can be made by the State Engineer under the foregoing language is one of tendency. How could it be argued that finality attaches to a decision concerning the tendency to impair the value of existing rights. It is elemental that there would have to be further inquiry and review as to a dispute involving existing, vested rights.

NRS § 533.430(1) is also statutory evidence of the restrictions placed on the permits issued by the State Engineer. It reads in pertinent part:

> "Every permit to appropriate water, and every certificate of appropriation granted under any permit by the State Engineer upon any stream or stream system which shall have been adjudicated under the provisions of NRS 533.090 to 533.525, inclusive, shall be, and the same is hereby declared to be, subject to existing rights and to the decree and modifications thereof entered in such adjudication proceedings, and the same shall be subject to regulation and control by the State Engineer and the Water Commissions in the same manner and to the same extent as rights which have been adjudicated and decreed under the provisions of this chapter. . . . "

As stated above, the permits are subject to existing rights and this highlights the distinctiveness between the application and the adjudicative procedures of the provisions governing Nevada's water allocation system. The statute also emphasizes the fact that only if the administrative procedures of NRS §§ 533.090 to 533.525, inclu-

sive, are employed is the appropriation of water considered resolved and subject to the State Engineer's regulation and control. The permits issued to the Co-Petitioners stress the non-finalty of the application procedure by containing the above-mentioned statutory reservation:

> "This permit is issued subject to all existing rights on the source." (Tr. pp. 939-940, pp. 935-936).

Surely if the permits that are issued carry such a reservation, the "tendency" decision made by the State Engineer under NRS 533.370.1 cannot be considered adjudicative in nature or the express reservation mentioned in NRS § 533.430(1) and on the permits themselves are superfluous and meaningless.

A final point weighing against the inferential conclusion that by issuing the permits to Co-Petitioners the State Engineer conclusively determined that the underground waters, which are the subject of the permits, are not tributary to the Salmon River and its tributaries is evidence in the record that a conflicting opinion and ruling of the State Engineer, dated May 6, 1971 (R. pp. 1035-1037) (seq.) (Petitioners' Appendix "A", p. 9) covering well permits appropriating underground waters, in the same Salmon River basin where the instant questioned permits pertain to, by direct inference hold that the underground waters are tributary to the Salmon River. This ruling, of course, would be in direct conflict with the issued permits in this case. If the permits, issued in pursuance only to the application procedures, are final and adjudicative in nature and the reservation as to existing rights are meaningless, what recourse would the holders of conflicting pre-existing water rights have?

(2) The adjudication of vested water rights.

Under the statutory scheme of Nevada's permit system there is a route which can be pursued to administratively determine the relative water rights of claimants; NRS § 533.090, et seq. As explained by the Appeals Court, this procedure is a "stepping stone" to the judicial system. The administrative determination, when filed with the proper court, has the legal effect of a complaint in a civil action. NRS § 533.160(1). The Court can, after applicable notice and hearing procedures, modify or affirm the administrative determination. The decree of the court is final and conclusive. NRS § 533.210(1). This route was not pursued by the Co-Petitioners.

If the permit application procedure was envisioned to be conclusive, why the inclusion of the above described procedure to administratively determine the relative rights of water claimants? The other avenue or route already alluded to earlier in this reply is the institution of a suit in a State District Court to determine the relative rights of water claimants. NRS § 533.240. That this route can be exclusive and alternative to the administrative route of NRS § 533.090, et seq., is clear from the language of NRS §533.310 which states in speaking about State Court adjudication of water rights and its effect:

> "In which suit (District Court adjudication where a final decree has been entered) the adjudication and determination was not had in the manner provided in NRS §§ 533.090 to 533.265, inclusive, . . . "

The above language is reinforced by the wording of NRS § 533.240 to the effect that:

> "The court may at any time transfer the suit to the State Engineer for determination as provided in this chapter."

And by the language of NRS § 533.450(1) which states that:

> "On stream systems where a decree of court has been entered, the action shall be initiated in the court that entered the decree."

Petitioners rely on the provisions of NRS § 533.430(1) to show that the State Engineers determinations are adjudicative and conclusive. However, an inspection of the statute reveals that the provision is only operative after the strictures of NRS §§ 533.090 to 533.235, inclusive, have been complied with making the reference to this section inappropriate for the instant factual circumstance, since NRS § 533.090, et seq., was not complied with by Petitioners.

The Appeals Court concluded after a comparison between the application and adjudicative procedures that it would be erroneous to conclude that the State Engineer had primary or exclusive jurisdiction over the adjudication of water rights under Nevada's permit system. This is crystalline from the language of NRS §533.240, NRS § 533.310 and § 533.450(1) cited above. Also to be concluded by this comparison is the undeniable fact that a permit is not conclusive as to relative rights until the procedures as outlined by NRS § 533.090, et seq., or NRS § 533.240 are completed.

The Appeals Court to reinforce its decision in this matter of conclusiveness as to permits bolsters the proposition by citing to an impressive array of authorities both primary and secondary (Petitioners' Appendix "A" pp. 13-18). The pertinent and by far the most persuasive is a quote from 1 Hutchins, Water Rights Laws in the Nineteen Western States, 19-20 (1971) which states:

"The original water administration law of Nevada contained a provision based on those of Wyoming and Nebraska purporting to make the State Engineer's determination of water rights conclusive, subject to the right of appeal. This was believed by a majority of the Nevada Supreme Court to be unconstitutional. The law was promptly changed by the legislature to conform to the Oregon system in which judicial as well as administrative process is requisite to the effectiveness of the determination. The amended Nevada procedure was held valid."

The Respondent, based on the foregoing discussion would respectfully urge that there is no conflict between the statutory provisions of Nevada's water permit system and the decision of the Ninth Circuit Court of Appeals.

(b) Case law of Nevada.

(1) Proof by negation.

As pointed out by the Appeals Court in their opinion, the cases of *In Re Determination of Relative Rights: Frank Town Creek Irrigation Company v. Marlette Lake Company,* 364 P. 2d 1069 (Nev. 1961); *Jahn v. 6th Judicial District Court,* 73 P. 2d 499 (Nev. 1937); and *Ruddell v. 6th Judicial District Court,* 17 P. 2d 693 (Nev. 1933) are distinguishable from the instant case in that two of the cases, *Ruddell and Jahn* involved an affirmation of the binding effect of procedures similar to NRS § 533.090, et seq., after full adjudication and in the case of *Jahn* adjudication both administratively and judicially. The *Frank Town* case likewise was merely an affirmation of the procedures mandated by NRS § 533.090, et seq. These cases in no way stand as precedent for the conclusiveness of the application procedures. Neither do they

stand for a principle of the primary or exclusive jurisdiction of the State Engineer.

Other Nevada cases cited are also inapposite to the present case and are not pertinent to the issues of said case. *Round Mountain Mining Company v. Round Mountain Sphinx Mining Company,* 36 Nev. 543, 138 P. 71 (1914), which Petitioner cites for supporting the proposition that Respondent by failing to protest the issuance of Co-Petitioners' permits waived its rights in the present case, involved the issuance of patents to mining locations, where the decisions of the administrative agency are usually conclusive. However, even mining location patents can be collaterally attacked per the opinion of *Round Mountain,* supra, if the questioned patent is invalid by reason of a previous patent disposing of the land. As stated in *Round Mountain:*

"A failure to assert adverse rights, however, will not estop an adverse claimant from protesting and bringing to the notice of the department such facts as tend to show non-compliance by the applicant with the requirements of the law. Id. at 138 P. 73."

This same idea is formulated in the administrative procedure under NRS § 533.090, et seq., and as outlined above, NRS § 533.090, et seq., allows conflicting claimants an avenue for the determination of their relative rights.

In Re Water Rights in the Humboldt River Stream System, 49 Nev. 357, 246 P. 692 (1926), cited by the Petitioners as analogous to the instant facts, is not analogous. *In Re Water Rights in the Humboldt River Stream System,* supra, involved a case where provisions similar to NRS § 533.090, et seq., has been complied with and the State Engineer had filed the administrative determination with a State District Court (See NRS § 533.240, su-

pra) for final adjudication. As Respondent has repeatedly stated, Petitioners have not complied with the demands of the statutory adjudication procedures so the case is inapposite as an authority. Additionally, the appeal for an injunction in *In Re Water Rights in the Humboldt River Stream System,* supra, was made in the same judicial proceeding where a final court decree was pending which was contrary to statute. This is not the situation in the present case.

Finally, the citation to the case of *Humboldt Lovelock Irrigation Light & Power Company v. Smith,* 25 F. Supp. 571 (DC Nev. 1938) is inappropriate since the case involves a factual situation where the State Engineer found that pre-existing water rights conflicted with the appropriations allowed to the Plaintiff by the State Engineer. This case only underlines the contention of the Respondent that the appropriations allowed by the State Engineer are not conclusive. Also the case expressly states that the State Engineer's determinations are subject to judicial review. *Humboldt Lovelock Irrigation Light & Power Company v. Smith, Id.* at 575. This would be especially so in this case where the right to interpret the decreed water rights was specially reserved by the rendering court (Tr. p. 113).

(2) Affirmative proof.

As to affirmative proof that the decision of the Appeals Court is not in conflict with the applicable state law, the opinion cites the holding in *Chappellet v. Birbeck,* 296 P. 2d 946 (Nev. 1956), where the lessees of certain farm lands notified the lessors that they were electing to terminate the lease, relying upon a provision of their

lease agreement which provided that they may do so "in the event there is an insufficient supply of water . . .to properly irrigate." The lessors brought a damage action against the lessees for breach of the lease. It was established that the lessor had a water right appurtenant to the farm lands in question to divert 5 c. f. s. of underground water. At trial the lessees produced expert testimony to the effect that the underground source had the capability of providing no more than .085 c. f. s. of water, which was insufficient to irrigate. The lessors objected to this testimony since they claimed that their water right gave them the right to pump 5 c. f. s. of water and that it was error for the court to receive the expert testimony of the lessees because the testimony constituted "an improper attack upon their water right and upon the determinations of the State Engineer upon which it was based." The response of the Nevada Supreme Court to this contention was as follows:

> "Defendant's evidence was no attack upon lessor's water right. The evidence served simply to establish factually the extent of the limitations which the certificate recognized to exist." *Id.* at 296 P. 2d 949.

The above cited language infers that the reservations on the Co-Petitioner's permit in this case are meaningful and subject to judicial determination since the judicial determination would not be an attack on the water permits as such, but only a determination as to the extent of the limitations expressed by the wording "subject to all existing rights" appearing on the permit.

Respondent would therefore respectfully urge this Court, that based on the inapplicability of Petitioners' authority and upon the affirmative showing by Respond-

ent, that this Court deny the Petition for a Writ of Certiorari since the Petitioners have not demonstrated any conflict between the decisions of the Ninth Circuit Court of Appeals and any applicable state law nor have Petitioners demonstrated any conflict between the instant decision and the decisions of this Court or of a sister Court of Appeals.

IV.

Summary Judgment

Petitioners argue that the Ninth Circuit Court of Appeals in not affirming the Summary Judgment entered by the District Court failed to assign the proper significance to the Rule 56 (e) of the Federal Rules of Civil Procedure. At the threshold level, Petitioners have ignored the concurring opinion of Judge Schwarzer which summarizes the factors making this case inappropriate for Summary Judgment. Judge Schwarzer concluded that Summary Judgment was inappropriate in as much as that claim (Respondent's) involves (1) factual issues concerning the interpretation of the language of the decree (1953 Judicial Decree) in light of evidence of the intention of the parties, and (2) factual issues concerning the effect of defendants taking of water on plaintiff's rights, it cannot be said that there are no genuine issues of material fact to be tried. (Petitioners' Appendix "A", pp. 21-22) (Parentheticals added).

In addition, as has been pointed out earlier in this reply, the bases of the District Court's Summary Judgment; that is the State Engineers primary and exclusive jurisdiction to adjudicate water rights in the State of

Nevada and the operation of res judicata and collateral estoppel as to said determination of the State Engineer in issuing permits to the Co-Petitioners do not apply according to the majority decision of the Ninth Circuit. This being the situation, one would never reach the demands of Rule 56 (e) since the Petitioners did not sustain their burden of clearly establishing the lack of any triable issue of fact. Therefore, Summary Judgment was not warranted at the trial level even if the non-moving party (Respondent) did not offer any responsive affidavit or other materials. *Adickes v. S. H. Kress and Company,* 398 U. S. 144 (1970).

It is also to be noted that there are many restrictions and cautions in applying Rule 56. Respondent in its Brief (Appellant's Brief, pp. 16-21), cites numerous decisions which enunciate the basic caution that Summary Judgment should only be employed where it would not cut litigants off from their right of trial if they really have issues to try. See e. g., *Sator v. Arkansas Natural Gas Corporation,* 321 U. S. 620, 627 (1944). As determined by the Court of Appeals in this case, the bases of the District Court's Summary Judgment are erroneous and therefore Respondent is entitled to litigate the matter of whether the permits issued to Co-Petitioners are in contravention of the 1953 Judicial Decree governing the water rights of the Salmon River and its tributaries.

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CONCLUSION

Respondent, based on the failure of Petitioners to show any conflict between the instant decision of the Ninth Circuit Court of Appeals and the decisions of this Court or of any sister Court of Appeals or with any applicable state law, would respectfully urge this Court to deny the requested Petition for a Writ of Certiorari.

DATED this 27 day of April, 1978.

Respectfully submitted,

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